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PLAINTIFF'S CONDUCT IN PRODUCTS LIABILITY ACTIONS: COMPARATIVE NEGLIGENCE, AUTOMATIC DIVISION AND MULTIPLE PARTIES

RICHARD A. EPSTEIN*

THE GROWTH AND DEVELOPMENT of products liability law in the last generation has had a large impact upon many firms that once enjoyed a broad immunity from the rigors of tort law. Drug manufacturers, who in bygone years had little to fear if their products were properly formulated and prepared, now face the onslaught of actions based upon their failure to supply full and adequate warnings to consumer or physician, as the case may be. Machine tool manufacturers, who were once protected by an arsenal of defenses, are now exposed to massive liability even with respect to products manufactured and marketed years before the recent growth in products liability law. Automobile manufacturers are no longer responsible only for the occasional miscarriage attributable to construction defects, but must also respond to a new class of design defect actions based upon the alleged uncrash-worthiness of the vehicle in question. Nor have airplane manufacturers, not to mention their component part suppliers, designers and distributors, been able to stand aloof from the recent explosion in products liability law.

In some respects, this vast proliferation of products liability actions has resulted in much specialization within the bar. The expertise needed to make out a duty-to-warn case against a pharmaceutical house is very different from that relevant to a design defect

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case against a machine tool manufacturer or an uncrashworthiness case against an automobile or airplane manufacturer. Yet, a breakdown of subject matter by product line can only obscure some essential features that unite apparently disparate causes of action. Long ago in his article, *The Path of Law*, Oliver Wendell Holmes, Jr., wrote of the vagaries of jurisprudential attitudes:

There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant. The same state of mind is shown in all our common digests and text-books. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as Shipping or Equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law.¹

The dangers which Holmes articulates are especially evident in the treatment of plaintiff's conduct in products liability actions.² No matter what the nature and structure of the product, no matter what the theory of the underlying cause of action, there is one issue which can be litigated in most, if not all, products liability actions. That question is whether the plaintiff's misconduct—even conduct not amounting to a deliberate and voluntary assumption of risk—acts as a complete or partial defense in a products liability suit. The particulars of the contributory negligence defense will, of course, vary from case to case.³ For example, there is no doubt that the standard of care expected of a licensed pilot is far more exacting than that of the ordinary automobile driver. Yet,

¹ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474-75 (1897).

² See, e.g., for some of the writings on this question, Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978); Twerski, *Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978).

³ While the issue is usually phrased in terms of plaintiff's contributory negligence, there is no reason why the courts could not, if they so chose, develop strict defenses that are in all material respects analogous to the plaintiff's basic strict liability cause of action. Indeed in cases involving harms inflicted upon strangers (as opposed to users and consumers) I have advocated just such an approach. See Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 174-85 (1974). For the development of this theme in connection with products liability actions, see text accompanying notes 25-29 *infra*.

these differences in application can only be evaluated if there is some judicial willingness to take the plaintiff's conduct into account in determining the liability of a product manufacturer or supplier. As of late, a number of courts have declined to recognize contributory negligence as a complete or partial defense.⁴ Likewise, a substantial and perhaps even greater number of courts have thought the defense relevant in products liability actions much as in other suits.⁵

In this paper I shall again address the question of the relevance of the contributory negligence defense, whether as a complete or a partial bar to plaintiff's recovery. In the first section I shall attempt to explain why this defense was not an issue in the early products liability actions prior to the publication of the Restatement (Second) of Torts in 1965. In the second section I shall argue that contributory negligence should indeed be recognized as a defense, whether comparative or contributory negligence is the rule within a given jurisdiction. In the third section I shall argue for a general rehabilitation of the older admiralty rule which called for an automatic division of all losses caused by the wrongful conduct of both plaintiff and defendant. In the last section I shall discuss the application of comparative negligence rules to actions involving multiple defendants, only some of whom may be products liability defendants.

Throughout this paper I shall consider the automobile as well as the airplane. The conclusions reached in the one context are clearly applicable to the other. Holmes was certainly correct about churns, even if his treatment of the contributory negligence issue is not beyond criticism.⁶

I. BACKGROUND AND HISTORY

In the formative years of products liability law little attention was paid to affirmative defenses based upon plaintiff's conduct. At

⁴ See, e.g., *Brown Mfg. Co. v. Williams*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); *Rudisaile v. Hawk Aviation, Inc.*, PROD. LIAB. REP. (CCH) ¶ 8391 (N.M. 1979).

⁵ See, e.g., *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), discussed in text accompanying notes 19-29 *infra*. For a collection of cases, see generally Annot., 46 A.L.R.3d 240 (1972).

⁶ See, e.g., *Baltimore & Ohio R.R. v. Goodman*, 274 U.S. 65 (1927).

first blush, this conclusion seems odd because the vast bulk of products liability actions involved injuries to users or consumers. In these cases the simple temporal progression of events makes the plaintiff's conduct a link in the chain between original defect and ultimate injury. How then can his conduct not be an issue? The puzzle, however, is resolved by noting that the original products liability actions were limited to cases in which a concealed defect caused harm while the product was being used in the ordinary and proper way.⁷ The ordinary and proper use requirement (as part of the basic cause of action) negated recovery whenever any plaintiff's misconduct was found. It also eliminated the need to attach independent status to the defenses concerned with plaintiff's conduct.

This basic account of the original products cause of action also helps explain why assumption of risk, often disfavored in other areas of the law, paradoxically emerged as the first of the products liability defenses. Typical of the early cases that coupled assumption of risk with the narrow conception of product defect is *Kassouf v. Lee Brothers, Inc.*⁸ In that case the plaintiff suffered severe internal disorders when she ate a chocolate bar that contained worms and maggots. The first bite tasted "funny," but only too late did she discover its contamination. The defect, of course, was latent and unknown; the consumption of the bar was normal and proper. If the plaintiff had known of the defect the injury would have been self-inflicted and the action properly barred. The importance of knowledge and assumption of risk is highlighted, moreover, if the plaintiff's action is regarded as based upon an implied representation that the defendant's chocolate was fit for human consumption.⁹ Reliance is one of the essential elements of

⁷ See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). The requirement is picked up in the definition of product defect in the RESTATEMENT (SECOND) OF TORTS § 402A(comment g (1965)).

⁸ 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962).

⁹ The misrepresentation theory in essence argues that what counts as a product defect can only be determined by gathering from all possible sources—a product's appearance, the manuals that instruct upon its use—the express and implied statements by the defendant about the purposes to which the product can be put and the limitations under which it ought to be operated. Some version of the misrepresentation theory is found in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 21, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962) where Justice Traynor wrote:

In the present case, for example, plaintiff was able to plead and

that claim, and such could not be established if the plaintiff had in fact known of the chocolate's dangerous condition.

The real question is whether the facts in *Kassouf* admit a contributory negligence type defense. Here the court quite properly held that they did not. The shared expectations of buyers and sellers of food and drink are that the buyer is *entitled* to trust the seller to package it correctly and need not make any independent investigations of product fitness.¹⁰ The result reached depends solely upon the sense of the bargain between the two parties, who, with the passing of the privity limitation, are treated as if they had

prove an express warranty only because he read and relied on the representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do.

For an exhaustive development of this theme, see Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

¹⁰ The point about shared expectations and their relationship to entitlements cannot be overstressed. In many modern decisions, the test of recovery is often stated such that the defendant's product is defective if it does not protect the plaintiff against any "reasonably foreseeable misuse" of the product in question. See, e.g., *Green v. Volkswagen of America*, 485 F.2d 430 (6th Cir. 1973). Such a formulation is instructive to the extent that it prevents the defendant from arguing that his own subjective expectations of product use ought solely to determine what product misuse bars recovery and what does not. It is also useful insofar as it suggests that the defendant's product must allow for some margin of error in the plaintiff's use, as with a tire inflated to 28 pounds instead of 26 pounds per square inch. Yet it is wholly misguided if all it means is that the defendant is responsible whenever there is foresight of possible error, for such is always the case as manufacturers are well versed in the weird and unaccountable ways in which these products may be used and abused. The better cases recognize that some limitation must be placed upon foreseeability and phrase it in terms of the entitlement. "If the chattel is safe when sold, a manufacturer is not *required* to anticipate or foresee that a user will alter its condition so as to make it dangerous, or that he will continue to use it after it becomes dangerous due to alteration in safety devices intended to protect the user from harm." *Westerberg v. School District No. 792*, 276 Minn. 1, 10, 148 N.W.2d 312, 317 (1967) [emphasis added]. Note that the term "required" imports the sense of obligation. It is of course foreseeable, or even reasonably foreseeable, that users will alter the products they acquire, or that they will fail to maintain them. Only if "foreseeable" is interpreted in a normative and not a predictive fashion is it possible to reach the sensible result of the *Westerberg* decision.

See for an earlier expression of the same theme, RESTATEMENT (SECOND) OF TORTS § 395, comment j (1965).

entered into a direct contract of sale. The very misrepresentation theory that makes short shrift of cases like *Kassouf* also lends support for the treatment of plaintiff's conduct in Comment n to Section 402A of the Restatement (Second) of Torts. This comment, widely accepted as the basis for the modern law, reads in full as follows:

Since the liability with which this section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.¹¹

The comment, of vast importance to the modern law, serves as the focal point for our subsequent analysis of contributory negligence, assumption of risk, and product misuse.

II. CONTRIBUTORY NEGLIGENCE

A. In Modern Products Liability Actions

Kassouf and kindred cases illustrate the wisdom of rejecting the contributory negligence defense for harms caused by latent defects in food and drink. After publication of the Restatement (Second) of Torts, the central analytical problem relating to defenses was whether to preserve Comment n in the face of the unprecedented expansion of the basic defect concept.¹² Most courts, not fully

¹¹ RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).

¹² The expansion involved the growth of both design defect and duty-to-warn causes of action. Both of these existed in limited form before the Restatement. For the earlier law on the question, see Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962). The Restatement provisions directed to design defects show a similarly guarded tone. See RESTATEMENT (SECOND) OF TORTS § 402A, comment h (1965): "A product is not in a defective condition when it is safe for normal handling and consumption." For the narrow provisions on design defects, see RESTATEMENT (SECOND) OF TORTS § 398 (1965); the same can be said of the warnings provision § 388, comments g & h. The real case law expansion of the subject originally came

cognizant of the revolution on the defect issue, either blandly adopted the Restatement position or announced the even broader proposition that all contributory negligence defenses were incompatible with the strict liability theories of Restatement Section 402A. These extensions are misconceived. *Kassouf* does not rest upon the immateriality of contributory negligence to products liability causes of action; it rests instead upon the narrower proposition that *in this particular context* the shared expectations are that this consumer has *no duty* to seek out product defects. Change the product or the circumstances under which it is distributed, and the web of obligations that governs its use will change as well. While Comment n reads as though it were a first principle of tort law, it should be construed as a statement of the implied terms of a bargain about a narrow, if important, class of products. Food and drink, to which the early versions of Section 402A were in fact limited, conjure very different expectations than do airplanes, machine tools or automobiles.¹³

The pressure that the broad definition of defect places upon the rules for plaintiff's conduct is well revealed by *Melia v. Ford Motor Co.*¹⁴ The decedent was killed in an intersection collision when she was thrown out of her car through the unlocked door on the driver's side. The plaintiff contended that the door was defective in design in that it was not fail-safe against certain horizontal forces that could open it while shut but unlocked. This question of design defect was difficult and controversial, and the dissenting judge thought the plaintiff's case should not even reach the jury. At issue were three facets of the plaintiff's conduct: 1) she entered the intersection against the red light; 2) she left her door unlocked; and 3) she had not buckled her seat belt. By a divided vote the

through the expansion of negligence principles for design defects. See, e.g., *Davis v. Wyeth Laboratories, Inc.* 399 F.2d 121 (9th Cir. 1968); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970). For my criticism of these developments, see Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643, 648-54 (1978).

¹³ See RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 6, 1961), which was limited to food products, and RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 7, 1962), which was extended to products intended for "intimate body use." The development of the case law within the area was so fast on the strict liability question that by 1965 the section was extended to cover all products.

¹⁴ 534 F.2d 795 (8th Cir. 1976).

court held, on its view of Nebraska law, that these issues were of no concern in a products liability action, citing Restatement Comment n in support of that position.¹⁵ In the absence of plaintiff's knowledge of the particular defects in the door-locking mechanism, the Comment n defense was not established.

Again the court flounders on the issue of shared expectations. The elimination of the privity requirement forces the court to treat the parties as immediate buyer to immediate seller. It staggers the imagination to assume that any implicit agreement between them contemplated that the buyer could drive as he pleased, thereby exposing the defendant to costly and uncertain litigation. Simply because the plaintiff in *Kassouf* did not have to pick her way through a wormy bar of chocolate does not mean that the decedent in *Melia* could drive like a fool. Knowledge that the chocolate has turned in one case may be a precondition for intelligent action by the user of the product, but knowledge of a minute design defect in a car door is not required in order to make safe driving necessary. Running red lights is in violation of statute, regardless of the condition of the automobile; it is not wrongful or risky solely because of an alleged design defect. Wearing seat belts and locking doors are common precautions that protect against a host of injuries; the decedent's was but one. *Greenman v. Yuba Power Products, Inc.* evokes the image of a plaintiff "powerless" to protect himself against an array of awesome and unknown hazards.¹⁶ Its message should be established in each individual case. The plaintiff's conduct in *Melia* barred her action against the driver of the other

¹⁵ *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976). The Nebraska statute on the subject involves a slight-gross rule whereby the comparative approach is invoked when the plaintiff's negligence is "slight" and the defendant's negligence, in comparison with it, is "gross". NEB. REV. STAT. § 25-1151 (1975).

¹⁶ "The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 21, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962). Note the quotation does make some sense where the cause of action is confined, as it was in *Greenman*, to products known by the manufacturer "to be used without inspection for defects," and to plaintiffs who use the product "in the way in which it was intended to be used." The argument is far weaker when extended to the broader accounts of defect that have emerged since the publication of the Restatement in 1965. See, for further critique, Epstein, *Products Liability*, supra note 12, 56 N.C. L. REV. at 658-662.

car.¹⁷ It is difficult to see why a defense of contributory negligence, clearly applicable in the one context, should not be applicable to the other.

The same set of principles has especial relevance in connection with aviation accidents, where contributory negligence in products cases has been greeted with the same chilly reception. In *Rudisaile v. Hawk Aviation, Inc.*,¹⁸ the New Mexico court allowed the plaintiff to recover when her husband, a qualified pilot, crashed after taking off in a Piper Cherokee 140 E. The plane had been drained mistakenly of all its oil before flight, and it had not been replaced. The decedent did not undertake the customary preflight check of the aircraft before he took off. Here there is no question but that the defendant's conduct is inexcusable; yet the same can be said about the plaintiff's. If the plane had crashed into a farmhouse, the decedent's estate would have been held jointly responsible with the defendant, precisely because the decedent's duty was so clear. Given this web of shared expectations within a highly structured institutional framework, there is no reason why the plaintiff's contributory negligence should not be regarded as a defense, simply because his action is brought under a products liability theory.

Melia and *Rudisaile* represent one side of an issue on which legal opinion is divided. In a stunning reversal, the California Supreme Court, long a leader in the expansion of products liability, adopted comparative negligence type principles by a four to three vote in *Daly v. General Motors Corp.*¹⁹ The matter is one on which present division of opinion invites a closer examination of the arguments both for and against the contributory negligence defense. The case for accepting some form of contributory negligence is best made by looking at the reasons that are used for its rejection. These are clearly expressed in the impassioned dissent of Justice Mosk in *Daly*:

This court has emphasized over and over again that strict products liability is an independent tort species wholly distinct from contract warranties . . . and from negligence. . . . Indeed, in *Cronin* we stressed that 'the very purpose of our pioneering efforts

¹⁷ *Melia v. Svoboda*, 191 Neb. 150, 214 N.W.2d 476 (1974).

¹⁸ *Rudisaile v. Hawk Aviation, Inc.*, PROD. LIAB. REP. (CCH) ¶ 8391 (N.M. 1979).

¹⁹ 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence'. . . . And in *Lugue v. McLean*, . . . this court unanimously declared that 'contributory negligence does not bar recovery in a strict liability action'. . . .

The bench and bar have abided by this elementary rule. They have learned to avoid injecting negligence—whether of the defendant or the plaintiff—into a products liability case. And they have understood the reason behind the distinction between negligence of any party and products liability. . . .

Transferring the liability, or part of the liability, from the party responsible for putting the article in the stream of commerce to the consumer is precisely what the majority propose to do. They do this by employing a euphemism: the victim's recovery is to be 'proportionately reduced.' The result, however delicately described, is to dilute the defect of the article by elevating the conduct of the wounded consumer to an issue of equal significance. We can be as certain as tomorrow's daylight that every defendant charged with marketing a defective product will hereafter assert that the injured plaintiff did something, anything, that conceivably could be deemed contributorily negligent: he drove the vehicle with a defective steering mechanism 56 miles an hour instead of 54; or he should have discovered a latent defect hidden in the machinery; or perhaps he should not have succumbed to the salesman's persuasion and purchased the defective object in the first instance. I need no crystal ball to foresee that the pleading of affirmative defenses alleging contributory negligence—or the currently approved substitute terminology—will now become boilerplate.²⁰

B. *Fairness Arguments*

Notwithstanding Justice Mosk's strong plea, the case for retaining contributory negligence remains secure. The point of departure is that courts have always treated the plaintiff's conduct as a proper source of inquiry in all manner of torts actions, no matter what the substance of the plaintiff's original cause of action. Not only is contributory negligence regarded as an appropriate defense in the typical highway accident case, but analogous defenses based upon plaintiff's conduct are viable in traditional causes of action based explicitly upon strict liability principles. Provocation is available as a defense in strict liability actions brought against the owner of a wild animal.²¹ The default of the plaintiff, however

²⁰ 20 Cal. 3d at 758-60, 575 P.2d at 1182-83, 144 Cal. Rptr. at 400-01. (Citations and footnotes omitted.)

²¹ See W. PROSSER, *LAW OF TORTS* 523 (4th ed. 1971).

defined, is a defense to actions patterned upon *Rylands v. Fletcher*²³ for the escape of hazardous substances collected and stored on the defendant's premises.²³ Both contexts exhibit the same theme: the plaintiff has engaged in conduct that would expose him to liability if it injured a third person. There is no obvious reason, therefore, why that conduct should be ignored because the plaintiff has helped to injure himself instead. It is true that no person can sue himself; nonetheless, his conduct can be taken into account in actions that might otherwise promise full relief. The plaintiff who shares in the production of his own harm can raise no obvious moral claim against being required to shoulder a part of his own loss.²⁴ Within this framework, strict liability does not preclude an examination into plaintiff's conduct; to the contrary, it invites it.

The basic equities of the situation are unchanged, moreover, even when applied to products liability actions. Justice Mosk's arguments of "*symmetry*", echoing those of Comment n, are designed to give some *a priori* credibility to the argument that as negligence is no part of the *prima facie* case, it should be no part of the defense. A closer examination of the situation demonstrates, however, that no single conceptual refinement can bear the immense burden of undoing all contributory negligence defenses. Justice Mosk is on sound ground when he notes the administrative advantages of strict liability compared to negligence.²⁵ He fails to note, however, the small cash value of the doctrinal change, given the extensive use of *res ipsa loquitur*, and the repeated insistence on a very high standard of care. The tiny change brought about

²³ L. R. 3 H. L. 330 (1868).

²³ *Fletcher v. Rylands*, L. R. 1 Ex. 267 (1866) *aff'd* in *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868), where it is noted that the defendant "can excuse himself by showing that the escape was owing to the plaintiff's default."

²⁴ "It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the 'all-or-nothing' approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault." *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 810, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 860 (1975). The classic article in favor of comparative negligence is still Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1 (1953). For a thoughtful modern defense of the comparative negligence rule, see Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978). For criticism of the pure comparative negligence approach adopted in *Li*, see notes 40-46 and accompanying text *infra*.

²⁵ See text accompanying note 20 *supra*.

by the movement from negligence to strict liability as the basic cause of action provides no warrant for a massive revolution in the law of affirmative defenses.²⁶ If anything, one expansion of plaintiff's rights should caution against any further, independent shift in the same direction. Courts that relax one requirement—defendant's negligence—in the plaintiff's case for administrative ease need not dismantle another barrier to recovery—contributory negligence—which has its own independent justifications.

Suppose for the moment, however, that the changes in the basic cause of action should work symmetrical changes in the law of affirmative defenses. What follows from this premise is not that contributory negligence should be eliminated, but rather that it should be strengthened.²⁷ The point becomes clear by noting the two separate elements which together form the contributory negligence defense. The first is the identification of the plaintiff's conduct which is in fact wrongful. The emphasis here is on the causal element that *contributes* to the harm. In *Melia*, for example, that conduct was the running of a red light. In *Daly*, it was speeding down a freeway and crashing into a guardrail. The second element—the *negligence* part of the defense—is the requirement that the plaintiff who engaged in this wrongful conduct could have avoided the harm by the exercise of reasonable care. Proof of this second element is often trivial, but it is easy to give instances in which it is not. The plaintiff in *Melia*, for example, might have run the red light in order to escape from a gangster who had threatened her life. The plaintiff in *Daly* might have hit the guardrail not be-

²⁶ In the years up to the publication of the RESTATEMENT (SECOND) OF TORTS, the shift from negligence to strict liability was of little consequence for two reasons. First, the courts were willing to use the doctrine of *res ipsa loquitur* aggressively to help the plaintiff establish negligence once the defect causing damage was proved by other evidence. This was the position of the California Supreme Court in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944), where Justice Traynor's opinion was only a concurrence. In addition, courts had already decided that manufacturers and kindred parties, owing to their special state of expertise, had to conform to a very high standard of care. See, e.g., *Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155 (1924). The real revolution in products liability law came not with the move from negligence to strict liability, but with the vast expansion of the defect concept in the years following the publication of the RESTATEMENT (SECOND) OF TORTS (1965). See notes 12-20 and accompanying text *supra*.

²⁷ I have made the parallel arguments with respect to the treatment of plaintiff's conduct in nuisance actions. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 70-72 (1979).

cause he was drunk, but in order to take a sick child to the hospital.

As contributory negligence involves both causation and a want of reasonable care it then becomes crucial to ask what becomes of each element in the application of symmetry principles to a strict liability cause of action. The shift from negligence to strict liability strengthens the *prima facie* case; it does not insulate the defendant from all liability. So too a shift from contributory negligence to contributory causation should make the plaintiff's conduct more central to the disposition of the case. It should not insulate him from all the consequences of his own conduct. Indeed once the strengthened defense is incorporated into the law, the defendant should be able to prevail by showing that the plaintiff did some wrongful conduct, because the plaintiff's possible excuses will all be irrelevant. Under symmetrical principles the plaintiff could not use the gangster chase or the child's sickness as an excuse to escape from the basic defense, which now assumes broader proportions than before.

The basic point is unchanged even if Justice Mosk was right in dwelling on the administrative workability of the defense. The defendant has little or no access to the information about the plaintiff's conduct. The very same problem that motivated the shift to strict liability in dealing with the defendant's conduct works in favor of a shift from contributory causation in dealing with the plaintiff's conduct. "Symmetry" then leads to the elimination of negligence from the affirmative defenses, but not to the elimination of affirmative defenses from the entire lawsuit.

The real question in this entire area, however, is not what symmetry does, but whether there should be any need to satisfy symmetry constraints at all. The crucial point in products liability actions, at least those involving users and consumers of products, is that there is no initial symmetry between the roles of the two parties. Thus, there is no reason to assume that the standards of conduct applicable to the one must perforce be applicable to the other. In the simple food case it is, of course, appropriate to bar the plaintiff only where there is knowledge of the contaminated condition of the product about to be consumed.²⁸ Yet reasons of

²⁸ So Justice Mosk seems to agree. "If a consumer elects to use a product patently defective when other alternatives are available, or to use a product in a manner clearly not intended or foreseeable, he assumes the risk inherent in

symmetry do not allow the plaintiff recovery only when the defendant's employees also had actual knowledge of the particular defect that caused the harm. The same principles apply to other cases. The web of shared expectations may not require the injured party to reach the level of performance expected of a manufacturer. They may make allowances for workers who do not follow every petty workplace rule, every idle statutory regulation, every detailed manufacturer's instruction, no matter how unwise or uncertain. Yet these problems can be handled as in other contexts: thus the contributory negligence provisions of the Restatement²⁹ set out a workable set of excuses that can override the contributory negligence defense. They do not, by any stretch of the imagination, require the abandonment of the defense in its entirety. Traditional tort principles require that some plaintiff's conduct be excused, and they allow a wide variation in the exact standards for such excusable conduct.

Before turning to other aspects of Justice Mosk's opinion, it is useful to consider another conceptual rationale that from time to time has been used to justify the abrogation of contributory negligence in product liability cases: the duty of the defendant is to guard the plaintiff against his own negligence, which cannot, as if by definition, serve as an independent affirmative defense. The

his improper utilization and should not be heard to complain about the condition of the object." *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 763, 575 P.2d 1162, 1185, 144 Cal. Rptr. 380, 403 (1978). Although the remark was made in connection with a power saw used to trim fingernails, it applies equally well to the food cases.

²⁹ RESTATEMENT (SECOND) OF TORTS § 288A (1965) sets out the plaintiff's excuses for his breach of statutory obligation as follows:

- (1) An excused violation of a legislative enactment or an administrative regulation is not negligence.
- (2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when
 - (a) the violation is reasonable because of the actor's incapacity;
 - (b) he neither knows nor should know of the occasion for compliance;
 - (c) he is unable after reasonable diligence or care to comply;
 - (d) he is confronted by an emergency not due to his own misconduct;
 - (e) compliance would involve a greater risk of harm to the actor or to others.

Objection can be taken to the details of this formulation, yet, notwithstanding, there is no reason why these excuses cannot be applied with equal force to the plaintiff's conduct in a products liability situation, whether in a regime of comparative or contributory negligence.

basic argument was perhaps most forcefully set out by Justice Proctor in *Bexiga v. Havir Manufacturing Corp.*³⁰ In that case, the plaintiff, an eighteen-year-old youth on his first day of work, had his hand caught and smashed in a punch press manufactured by the defendant. The press was equipped with a foot treadle and was without any special hand safety guards. The court first decided that the plaintiff could make out a design defect case even though the defendant had followed the standard industry practice that called for the press purchaser to install whatever safety devices it regarded as suitable for its own particular end use. It then turned to the contributory negligence defense, which it rejected in the following words:

The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but that a breach of that duty results in no liability for the very injury that duty was meant to protect against. . . . We hold that under the facts presented . . . the defense of contributory negligence is unavailable.³¹

This passage is subject to two independent lines of criticism. First, the soundness of its conclusion rests upon the soundness of its premise. If the defendant's "duty" in design defect cases requires the protection of the plaintiff from all foreseeable misuses, then it is sensible to maintain that such misconduct by the plaintiff ought not to eliminate that responsibility by the back door. Narrower standards of design defects, however, are not only possible, but preferable. When attention shifts to "normal and proper use," or to the commands of statute or common practice, the particular conclusion reached in *Bexiga* fails along with its underlying premise. To the extent that defendant is *not* obliged to protect the plaintiff against his own misconduct or error, contributory negligence remains a defense. This assumes, of course, that the plaintiff has already surmounted the defect hurdle by showing, for instance, that the defendant's machine was not safe in ordinary use. As both the defendant's product and the plaintiff's conduct jointly cause the plaintiff's injury, it becomes only appropriate to apportion the

³⁰ 60 N.J. 402, 290 A.2d 281 (1972).

³¹ 60 N.J. 402, 412, 290 A.2d 281, 286 (1972).

losses between the parties under the rules applicable to other cases of joint responsibility.

The second criticism quickly follows from the first. One difficulty with the opinion in *Bexiga* (as the last sentence quoted intimates) is that it does not specify the scope of its own application. Ostensibly, the opinion is limited to design defect cases, but it is difficult to see how such a limitation can in fact be defended. Thus, under the argument in *Bexiga*, what reply can be made to the plaintiff in an ordinary traffic accident who says that his misconduct should be excused because the defendant was required to follow the rules of the road in order to protect those (if it matters, foreseeable) persons who might be driving in violation of the highway rules? All the elements of the *Bexiga* rule are there. The plaintiff's conduct is clearly substandard; yet, for that reason alone it is not unforeseeable. With negligence as a bar, a defendant's verdict will negate this duty to this plaintiff, if not to others. Notwithstanding, the contributory negligence rule persists. The defendant's liability in highway accidents may be conditioned upon the plaintiff's normal and proper driving, even when the defendant himself has violated a legal norm. The same conclusion is no less "anomalous" in products liability contexts.

All this is not to say that a total bar is itself just. Comparative negligence (or responsibility) may be in order for all products actions. The scope of these principles will be discussed in greater detail later, but one point is clear now: if the plaintiff's recovery in cases like *Bexiga* is not barred but reduced, then all mention of legal anomaly is misplaced. The defendant properly charged with a design defect—even by today's capacious standards—can *never* escape all liability once causal connection is established. The alleged duty, far from being nullified, remains the source of substantial liability. The arguments of Justice Proctor fare no better in the end than those of Justice Mosk. There is simply no pure conceptual argument that justifies the total abrogation of contributory negligence in products liability actions.

C. Incentive Arguments

In the course of his dissent in *Daly*, Justice Mosk also laid great stress upon the undesirable incentive effects that would be fostered by an acceptance of the contributory negligence defense in liability

actions.³² Although the point must be made with some caution, it seems in broad outline that the incentive arguments do more to support than undermine that defense. The customary justification for contributory negligence is, of course, that it imposes upon the plaintiff those incentives that encourage cost effective measures that help prevent his own injuries. The usual response to this argument is that a plaintiff, faced with the possibility of death or serious injuries, need not be subjected to legal sanctions in order to compel his cooperation in the loss control process. Instead, the argument continues, the powerful incentives should be directed towards the defendant, especially in the products liability context. Defendants are typically business firms, often large, that can and do make the appropriate cost calculations. They can "design out" product error and protect the plaintiff against the hazards of systematic neglect. Plaintiffs are isolated individuals who may not even know the applicable rules governing their own conduct. It is idle to expect them to respond to the indirect pressure created by the manipulation of the liability rules. To the extent that contributory negligence either reduces or eliminates the incentives created by the prima facie case, the argument continues, the law cuts back on one of its own essential missions, that of putting the liability upon the parties best able to make and act upon the appropriate cost benefit analysis.³³ This argument, it should be stressed, is not wholly without force, yet it is subject to a number of important caveats.

First, there is a danger that the argument could prove too much. Airplane pilots and automobile drivers clearly risk harm to themselves when they inflict harm upon innocent third parties. Yet no one would suggest that we remove all tort sanctions against them because of the dangers they face in their own activities. Why then should defenses based upon plaintiff's conduct be removed simply because the plaintiff exposes himself to injury?

Second, there is good reason to believe that many individuals will respond to the additional incentives even if faced with the possibility of personal loss. They will, in all likelihood, respond to such incentives when faced solely with property damage, especially

³² See Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 703-21 (1978), for a discussion of the basic issues in this section.

³³ For a more general development of this theme, see Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

if tort awards are fixed to make them indifferent between the property destroyed and the cash received on account of its destruction. Likewise, individuals may well respond to legal incentives even where life and limb are placed in peril. The reduction of the speed limits to fifty-five miles an hour is in all likelihood responsible for the sharpest drop in accident rates in the past thirty years,³⁴ and this is an era featuring both the extensive safety regulations under the National Highway Safety Act and the well-nigh universal adoption of the crashworthiness doctrine. If individual drivers were held adequately in check by fear for their own lives, then it would be ironic to assume that the threat of a small fine, coupled with a possible increase in insurance rates, or the suspension of a license would have much influence upon their behavior. Yet the decline in death rates suggests that the marginal contribution of these additional sanctions has indeed had that effect. What is true of these statutory sanctions may well be true of the private law sanctions as well. Individual parties need not know the refinements of the tort law in order to respond to the milieu that it creates; it is quite sufficient that they know as a crude truth that they will lose all or most of their recovery if they work like fools in the shop or drive like hot-rodders on the highway. The sanctions involved may be contingent in impact and uncertain in extent, but unless all individuals are oblivious to all probabilistic facts, it seems likely that the presence of contributory negligence defenses will have some favorable influence upon their conduct, and through it upon the accident rates. Ignorance is not a fixed fact of nature. If the de-

³⁴ The exact effects of the speed limit are difficult to determine because of the wide range of factors that influence the levels of accidents, including amongst others, the number of miles driven, the conditions of the roads, the use of alcohol and the average age of the driving population. Yet it seems clear that the speed limit, especially when enforced, is a dominant factor. Thus Secretary Coleman of the Department of Transportation has reported:

We have found that no accurate estimate can be made on the overall safety impact of the 55 mile-per-hour speed limit, but there should be high confidence that a large portion of the reduction in fatalities is due to the direct or indirect benefits of the new 55 mile-per-hour speed limit.

D.O.T. Appropriation Hearings, p. 68. Indeed major reductions in injuries and fatalities were reported between 1973 and 1974 which are in all likelihood attributable to the reduction in the speed limit.

"The flouting of the 55-mile-per-hour speed limit correlates almost exactly to the rising death rate, . . ." Chicago Tribune, April 29, 1979, § 7, at 3, col. 1-2. (quoting Lt. Robert Brandt, a spokesman for the Illinois State Police).

fense does control, the individuals ignorant of it today will surely be informed of it tomorrow, whether it be by a public service announcement about highway safety or from an insistent warning by a union shop representative.³⁵

Third, the conduct of private parties (to the extent that it has not been rendered futile by judicial regulation) also points to the importance of the contributory negligence defense in products liability actions brought by product users and consumers. It is commonly accepted (especially by critics of the marketplace) that, in the absence of judicial regulation, most manufacturers would require, and most consumers would accept, rules that barred misbehaving plaintiffs. As with virtually all terms between buyer and seller, there is every reason to believe that the durable distribution of risks between manufacturers and their customers represents the efficient distribution of risks between the two parties.³⁶ These restrictions upon recovery might be motivated in part by a commendable desire to reduce the administrative costs associated with accidents. They can also be interpreted as a market judgment that the incentives of a contributory negligence defense are worth preserving. The ultimate economic question is, of course, whether the incentives that are removed from the defendant are replaced by equal or more insistent incentives upon the plaintiff. While the result may vary from case to case and product to product, the perceived behavior of the interested parties creates a strong presumption that the incentive properties of affirmative defenses are indeed preferable to those under some alternative regime.

Fourth, the practical aspects of products liability litigation point in the same direction as the theory. The distinctive feature of these products liability actions is that the plaintiff is uniquely in the

³⁵ For a very skeptical account of the safety benefits of direct safety regulation, see Pelzman, *The Effects of Automobile Safety Regulations*, 83 J. POLITICAL ECON. 677 (1975) which, while concerned with the direct control over safety under the National Traffic and Motor Vehicle Safety Act of 1966, could be extended to various tort doctrines, e.g., crashworthiness, which are designed to achieve the same effect. In essence Pelzman's argument is that any benefits of increased safety regulation may be offset as consumers affected by such regulation change their primary conduct in ways that increase the likelihood of accidents, e.g., by traveling at greater speeds in the knowledge that they are less likely to be hurt by an accident because of improved roll-bars.

³⁶ I develop this theme in Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293 (1975).

better position to prevent the harm.³⁷ He typically has possession and control over the product at the time of its use and has information about the immediate environment in which it operates. The traditional negligence law allows these spatial and temporal priorities to work for the plaintiff when the defendant had "the last clear chance" to prevent harm. Recognition of the contributory negligence defense in products cases could also show the importance of the "proximate" in theories of proximate cause and ultimate tort liability in yet another context. The operator or user of a product, as in *Melia*, certainly had clear and effective means to avoid the harms in question. Incentives directed towards the elimination of their foolish conduct should not be dismissed as unnecessary or unworkable, even in a regime that seeks to create strong incentives upon manufacturers.

Fifth, the implied premise of this discussion of contributory negligence is that the rest of products liability law has already set into motion a set of ideal incentives for the control and regulation of the defendant's conduct, such that the recognition of any form of contributory negligence can only "dilute" the incentives placed upon the manufacturer "by elevating the conduct of the wounded consumer to equal significance."³⁸ Yet, all is not well in the basic products liability cause of action, particularly with cases involving challenges to product warnings and design.³⁹ If the incentives created in these areas are indeed both perverse and undesirable, then a strong set of contributory negligence defenses has a desirable tendency to correct the imperfections that have crept into other portions of the law. The offset will be far from perfect because the contributory negligence defense will apply with equal force to the strongest construction defect case and the weakest design defect case. The guess here is that the contributory negligence defense is of greatest importance where a product is alleged defective because of its inability to prevent injuries resulting from "foreseeable mis-

³⁷ The exceptions to this generalization apply mainly in cases of latent defects not detectable in ordinary use, which are exactly the cases to which the contributory negligence defense would not apply. See note 7 and accompanying text *supra*.

³⁸ *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 759, 575 P.2d 1162, 1183, 144 Cal. Rptr. 380, 401 (1978).

³⁹ See generally, Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

use" or "open and obvious" defects. As these cases tend to give rise to the most strained interpretation of the defect question, it seems reasonable to believe that the contributory negligence defense will come into play precisely in those cases in which it is most needed.

The incentive arguments of Justice Mosk, then, are not without their strength, but the arguments that can be marshalled on the other side seem to have greater merit. As is so often the case with incentive arguments, the results are inconclusive without empirical evidence, and the empirical evidence that is required is, only because of the difficulty of the subject matter, never forthcoming. The original fairness arguments, as reinforced in this section, still control.

III. AUTOMATIC APPORTIONMENT

Once it is established that the *wrongful* conduct (be it causation or negligence) of the plaintiff and defendant have jointly brought about the harm in question, the issue is how to apportion loss between them. Recent tort law has in one of its more startling innovations transformed contributory negligence from a complete bar to the source of reduction in the plaintiff's recovery: *i.e.*, comparative negligence. The earlier law regarded the administrative complications of apportioning losses as so great that courts should not burden their own facilities to aid a plaintiff who, after all, was as responsible for his own harms as the defendant.⁴⁰ The modern position on the issue downplays these administrative complications and assumes, if only as a matter of basic fairness, that an apportionment of damages is the legal corollary of joint causation. The tension between the two views of negligence runs the full length and breadth of the tort law, and it clearly applies to the products liability actions that involve the ordinary forms of contributory negligence. What should be done?

As an initial point, the debate over apportionment in products liability cases is limited by the conclusions reached in other tort contexts. Consider, for example, an action brought against both the operator of a heavy truck and its manufacturer. Where the matter

⁴⁰ For a statement of this view, see C. F. BEACH, JR., CONTRIBUTORY NEGLIGENCE 11-12 (1st ed. 1885).

concerns the conduct of the injured plaintiff, it seems difficult and unwise to have one rule for the operator and quite another for the manufacturer. This distinction *looks* unprincipled, and the use of separate rules can only complicate whatever adjustments amongst defendants are appropriate by way of contribution and indemnity. Products liability raises no distinctive apportionment issues.

The consensus of opinion today is that the "pure form" of comparative negligence best adjusts the competing equities between plaintiffs and defendants. The great advantage of this position is that it removes the possibility that any small shifts in the relative responsibility between plaintiff and defendant will have vast consequences upon the distribution of losses between them. A form of comparative negligence that permits the plaintiff to recover when found 'forty-nine' percent negligent, but that bars recovery at 'fifty' percent negligence places an incredible strain upon the legal system. The slightest re-evaluation of the negligence of either party can result in enormous shifts in the amount of the award.⁴¹ The pure comparative negligence system eliminates any sharp discontinuity at the margin. In a \$100,000 case, the plaintiff who is fifty-one percent negligent recovers \$49,000. A two percent swing in negligence cannot result in a \$100,000 swing in potential recovery.

In spite of this desirable characteristic, there are still strong objections to the pure comparative negligence system, both generally and in products liability contexts. In products cases it is often said that the formula will not work because it is impossible to compare the negligence of the plaintiff with the "strict" wrong of the defendant.⁴² The argument is of little merit, and indeed leads

⁴¹ The problems here are not dissimilar from those which involve the use of any balancing test to determine either negligence (as in traditional tort actions) or product defect (as in modern design defect cases). Whenever a welter of factors are combined in order to resolve a single question of fact, a slight variation in the value of one variable can result in an all-or-nothing change on the issue of liability. The Learned Hand formula for negligence provides that a defendant should be found negligent if the costs of precaution are less than a number equal to the plaintiff's damages multiplied by the probability of their occurrence. Note its all-or-nothing characteristics. If the cost of precautions are set at \$100 and the probability of accident at 1%, does it make sense to call the defendant negligent if the damages are \$10,001 but not if they are \$9,999? Indeed, this instability at the margins is one of the features of the classical negligence rule that argue for its rejection. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 152-60 (1973).

⁴² See, e.g., *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162,

to a delicious irony. The plaintiff brings a strict liability action to which there is a possible contributory negligence defense. Should the law insist upon a rule that induces the defendant, perhaps under the banner of negligence per se, to insist upon his own negligence in order to reduce the damages that must be paid the plaintiff? Should the law tolerate a distinction whereby the defense is inapplicable to strict liability actions for want of proper warnings or design, but not to their rough negligence equivalents that so often appear in the reports? Even if we pass these points aside, the difficulties of comparison between plaintiff's and defendant's wrongs persist even in a system of pure negligence or pure strict liability, *i.e.*, comparative responsibility. The plaintiff may bring an action for defective design and be met with the failure to follow customary work rules. The defendant may be sued on a construction defect theory, to which a defense of statutory breach or unreasonable assumption of risk is raised. The cases are shot through with such incommensurables, as *Melia* itself indicates.⁴⁸ The marriage of contributory negligence and strict liability adds another layer of confusion to the basic inquiry, but the system itself is beset with difficulties that antedate and overwhelm this "apples and oranges" objection.

The real source of difficulty arises even if we assume that the same standard of judgment may be brought to bear on both plaintiff's and defendant's conduct. The basic inquiry is, how does one generate *any* set of percentages about plaintiff's and defendant's responsibility from the raw data about their conduct, or their product? Whether we speak of negligence or strict liability, both parties are partly responsible for the loss in question. The defendant could not have harmed the plaintiff without the plaintiff's own cooperation; the plaintiff would not be harmed if the defendant's product was free of defect. Within this framework there is nothing about the particular pattern of factual information, even if perfectly known, that demands any unique set of percentages in any given case. All allocation of responsibility between the two parties is arbitrary, whether by a judge or by jury, whether by hunch or by computer. The claims of individual fairness are ill-served by

144 Cal. Rptr. 380 (1978) (Jefferson, J. concurring and dissenting; Mosk, J. dissenting).

⁴⁸ *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976).

the pretense that legal principles have a degree of precision that they do not in fact possess. The economic incentives upon the parties are hardly sharpened by any shift from a 50-50 to a 60-40 split. The necessary case by case determinations are both expensive and pointless. They may flatter the legal mind, but they do not advance the orderly administration of justice. If individual determinations must fail, then it is surely best to have a collective decision about the distribution of loss that extends to all cases of joint responsibility. The only way that such a collective decision can be made is by a fixed judicial or legislative rule that is less concerned with the false pursuit of perfect equity in the individual case and more concerned with the reduction of administrative costs and the introduction of a measure of certainty and predictability into the system.

In this connection, the best approach is still that of the older admiralty cases, however great their disrepute today.⁴⁴ Once it is settled that certain harms are jointly caused by two parties, then the loss should be apportioned between them under some fixed formula, probably one that reduces recovery for the jointly caused harms by, for example, 50 percent. The number is by no means perfect, but nothing about the facts of any particular case allows further principled refinements. *United States v. Reliable Transfer Co.*,⁴⁵ the very case which overturned the old admiralty rule, involved a ship grounding that occurred when the captain tried improperly to turn a vessel around in a narrow waterway after the Coast Guard had failed to mark the correct channel with the proper light buoy. The traditional rule required a 50-50 split, but only for those losses which could have been avoided by proper navigation and the proper light buoys. The court approved a division of 75-25 in favor of the Coast Guard, presumably under the theory that one party was "more" actively negligent than the other. In this situation, however, the relative degrees of the two negligences escape calculation. There is not only the long tradition that negligence never functions as a matter of de-

⁴⁴ For the American judicial origins of the rule, see *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1854). The rule was extensively criticized in G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 402-04 (2d ed. 1975).

⁴⁵ 421 U.S. 397 (1975).

gree;⁴⁶ there is also the admitted fact that if either party alone had caused the loss, its negligence, whether slight or great, would fasten the whole loss upon it. If the conduct of each party can hold it accountable for the full loss, then it can do so for *any* portion of it.

The artificiality of the *Reliable Transfer* solution of pure apportionment is heightened, moreover, when we consider the parallel apportionment problems in products liability cases. The negligence of the plaintiff is always closer to the injury than the wrong of defendant. The plaintiff's wrong is often active in nature, while the defendant's wrongful conduct may be only the failure to protect the plaintiff from himself. Yet cases may assign the greater weight of the loss to the defendant, on what must often be implicit "deep pocket" grounds. The possibilities for abuse are clearly evident in circumstances in which an honest person could not decide upon the proper division of losses with the criteria available for judgment. Flexible percentages, even if not misused, do not help one whit. The old contributory rule was unjust, if at all, only because of its "all or nothing" character. The pure comparative negligence rule avoids the all or nothing approach, but only at the cost of a ruinous excursion into the never-never land of flexible percentages. The fixed apportionment rule escapes the vice of the old contributory negligence rule, while avoiding the routine, but fruitless, pursuit for illusory percentages. The rejection of the absolute bar of contributory negligence leads not to pure comparative negligence, but to automatic division. Those who think that further refinement is possible have not indicated how it can be achieved.

IV. MULTIPLE PARTIES

The major problem in this area does not arise in two party suits, but in those frequent cases in which the injured party joins several defendants, each of which is arguably partially responsible for the loss. These cases create no particular problem under a contributory negligence rule because the absolute bar against the plaintiff oper-

⁴⁶ Thus the famous *bon mot* of Baron Rolfe that gross negligence was the same thing as ordinary negligence "with the addition of a vituperative epithet." *Wilson v. Brett*, 152 Eng. Rep. 737 (1843). The point may well be wrong with respect to this distinction. Yet, even if we can make functional the difference between ordinary and gross negligence, it by no means follows that we can measure the percentages of negligence causally responsible for some given harm.

ates for the benefit of each separate defendant. Matters are not so simple, however, under an automatic apportionment rule, for the question arises as to what principles should guide the automatic division amongst three or more parties.

The most cautious would apply the rules of automatic apportionment amongst the defendants as a class, leaving the determination of the plaintiff's percentage of the total loss to the flexible percentages in use today. Yet such a proposal is inconsistent with the notion of fixed percentages in the two party case; and, it creates an enormous discontinuity if a 50-50 division is imposed in two party cases while flexible percentages are applicable to plaintiff's conduct in multiple party cases. The adding or dismissing of a party from litigation could have enormous strategic consequences that bear no relationship to the merits of the claim against the additional party.⁴⁷ As products liability actions often involve multiple party situations, the benefits of the automatic rule will be severely circumscribed if limited only to two party cases.

Assuming that fixed rules are carried over to multiple party cases, two possible rules of apportionment suggest themselves. By the first, some fixed percentage of the loss will be kept upon the plaintiff regardless of the number of defendants brought into the case. The advantage of this rule is that it removes any incentive from the plaintiff to increase the number of defendants in order to decrease his portion of the load. Yet this advantage is illusory and in any event appears to come at too high a cost. In the first place, the rule in question could only work if those defendants sued by the plaintiff were not allowed to bring further defendants into the case, even in situations where these additional parties bore the brunt of the responsibility. Even if this costly prohibition were granted, however, nothing could prevent a defendant from persuading the plaintiff to bring direct actions against these parties, especially if they, and not the original defendants, are solely responsible for the harm in question. A plaintiff will be faced with extensive costs of suit no matter what the rule on multiple parties.

⁴⁷ One way to escape this discontinuity is to apply the pure comparative negligence rules to all cases between plaintiffs and defendants, and then to use automatic apportionment among the defendants. Such a proposal in no way reduces the recovery of the plaintiff, and benefits all defendants as a class by reducing the administrative costs of defending a products liability suit.

Artificial limitations on joinder seem both unwanted and unwarranted.

It seems, therefore, that the only possible rule is one that uniformly divides the loss by the number of responsible parties to the case. Where there are "n" parties, the plaintiff must keep 1/nth of the loss. To this rule there should be added an immediate qualification or an unfortunate "double counting" will arise if certain defendants are treated as separate entities in apportioning loss. In the products liability context, it is often common for the plaintiff to join both the manufacturer and retailer of a defective product. There is little to commend a rule which drops the significance of plaintiff's misconduct from a half to a third solely because of a redundant defendant, the retailer, who has in all likelihood an indemnity action against the manufacturer.⁴⁸ All those parties who are held, whether directly or vicariously, for a single product defect should be treated as one party for the purpose of the rules. The division of responsibility amongst themselves for their share will be determined as if they were the only defendants in the case. Typically, therefore, the manufacturer will bear the full brunt of the loss, and the retailer will have to step into his shoes only if the manufacturer is insolvent or beyond the jurisdiction. The use of these apportionment rules does not, of course, do anything to abrogate the general rules on joint and several liability. If any single defendant (or group of defendants) is unable to pay its portion of the loss, then it will be borne pro rata by all other responsible parties, including, of course, the plaintiff.

⁴⁸ The question of double counting was fairly addressed by the California legislation on the subject, CAL. CODE CIV. PROC. §§ 875-879, which was gutted by the California Supreme Court in *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). Thus section 876(b) reads:

Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them.

While the statute does not direct its attention to the products liability context, the parallel between the master-servant case and the manufacturer-retailer case holds except perhaps where the retailer takes an active part in the preparation of the goods for sale. Indeed the argument for counting retailer and manufacturer as a single party seems especially strong. The master in employment situations has some direct contractual control over his servants, so that his liability, though formerly vicarious, is often in fact based upon his primary conduct. Such is not the case with retailer's liability for the manufacturer.

The one remaining set of problems arises when the plaintiff settles with one or more of the defendants in advance of the trial. Upon plaintiff's recovery at trial, it is necessary to determine first, the effect of the plaintiff's settlement upon the amount of recovery against the remaining defendants, and second, the various rights of indemnity and contribution between settling and non-settling codefendants. On the first of these questions, it is possible to adopt two courses of action. One approach is simply to treat the plaintiff as though he has recovered his pro rata portion of the damages from the settling defendant, no matter what the actual level of settlement.⁴⁹ A \$100,000 case brought by a negligent plaintiff against four defendants, would, with the automatic 20 percent set-off, yield \$20,000 from each of three non-settling defendants, whether his settlement with the fourth defendant was for \$5,000 or \$150,000. This rule has been condemned because it allows the plaintiff to recover an amount *in excess* of his full injuries.⁵⁰ Likewise, it abrogates, full joint and several liability where the settling defendant escapes for less than his pro rata share. Yet, as both double and partial recovery could occur by settlement alone, it is by no means clear that the point is decisive.

The alternative rule reduces the amount of the damages owing by the amount actually paid in settlement. It avoids the problem of excessive or insufficient recovery, but it creates an incentive for a plaintiff to accept an inferior settlement from one defendant in order to finance suits against the others. The frequency of this occurrence is, however, hard to predict. It is unlikely that a plaintiff will settle cheaply with one defendant against whom he has a strong case in order to pursue the other dubious defendants into the shades of night. In any event, it might well be possible for all defendants to mount a united front against the plaintiff, so that partial settlements with single defendants may be difficult.

⁴⁹ This equal distribution was indeed contemplated in CAL. CODE CIV. PROC. § 876(a): "The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them." The California Supreme Court argued that the introduction of pure comparative negligence between plaintiff and defendant rendered the statute in effect obsolete. The position could be reversed, for the statute sets a sensible model for automatic proration amongst defendants that precludes the pure comparative negligence of *Li*. It goes almost without saying that the rules of contribution amongst joint tortfeasors are among the most shapeless of the common law.

⁵⁰ *Jamarillo v. State*, 81 Cal. App. 3d 968, 146 Cal. Rptr. 823 (1978).

The exact merits of the two alternative rules is quite difficult to evaluate. On balance, however, it appears that a rule which reduces recovery by a proportionate share is preferable to one that reduces by the amount paid. Such rule in effect treats each separate defendant as independent of all others. A decision by one defendant to settle will, therefore, neither increase nor decrease the exposure of other defendants. In this case, no plaintiff has an incentive to settle cheaply with any given defendant. The fact of settlement can be introduced, it should be assumed, by other defendants in order to reduce their own proportion of the liability, so the plaintiff cannot recoup his early losses from other defendants. By the same token, the independence of each defendant's liability eliminates any need for allowing any actions between settling and non-settling defendants. The non-settling defendant, as is now the case,⁵¹ should in any event be prohibited from bringing suit against a settling defendant, for only then is it possible to have any individual settlement before disposition of the entire case. In addition, given that the exposure of the settling defendant does nothing to decrease the exposure of the remaining defendants, the settling defendant should have no action against the non-settling defendant who escapes for lesser sums. There are doubtless unforeseen complications, *e.g.*, what happens if the injuries become more or less severe after the settlement, that will cause difficulties in the administration of any particular rule. These may tip the balance in favor of a rule that sets off only amounts paid from other awards. These complications, however, do not count as an argument against automatic apportionment in multiple party cases, as they will arise with ever greater fierceness under a pure comparative negligence system. Suits amongst codefendants (especially under pure comparative principles) have little internal structure or logic; the fewer of them that are seen, the better.

CONCLUSION

The advent of comparative negligence has generally been hailed as a great advance in the operation of the tort law, both in ordinary negligence actions and in products liability suits. There is, to

⁵¹ Such indeed was required by the California statute, CAL. CODE CIV. PROC. § 877(b).

be sure, much to be said in favor of a system that splits the loss where the best of substantive theories cannot single out any given actor as "the" wrongdoer for the harm in question. Yet, it is a mistake to conclude that the organization of this branch of the law is completed with the acceptance of this single moral insight. The inauguration of a new system of liability carries with it a whole host of subsidiary questions that cannot be answered solely by the choice of a major premise. In particular, a regime of comparative negligence—or if it matters, comparative responsibility—requires some technique of apportionment amongst the various parties to the law suit. The moral theory that calls for that apportionment cannot, however, accomplish it in any given way. It seems, therefore, better to have a *fixed* set of rules, be they of judicial or legislative origin, which do the apportionment after the basic principles of tort liability determine the parties amongst whom apportionment should take place. The dominant judicial trend, however, both in products liability actions, and in other areas, has gone quite the other way. The courts have left it largely to juries to decide how much of the loss should be fastened upon each party. In so doing they have not advanced the moving ethical ideal of the comparative negligence law. They have only served to make the administration of tort law generally, and products liability law in particular, more expensive and less predictable.